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This decision will be included in the bound volumes of the printed reports at a later date.

SURFACE TRANSPORTATION BOARD[1]

No. 41242

CENTRAL POWER & LIGHT COMPANY
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY

No. 41295

PENNSYLVANIA POWER & LIGHT COMPANY
v.
CONSOLIDATED RAIL CORPORATION

No. 41626

MIDAMERICAN ENERGY COMPANY
v.
UNION PACIFIC RAILROAD COMPANY
and
CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Decided: December 27, 1996

The Board grants, in whole or in part, motions to dismiss each of these cases on the ground that the defendant carriers are not required to publish local rates for the involved traffic. The Board also explains how it will handle competitive access and rate reasonableness issues governing future requests for bottleneck segment rate relief.

DECISION

BY THE BOARD:

BACKGROUND

These cases raise common issues concerning the rail transportation of coal, in trainload or unit-train shipments, to a utility's coal-fired electric generating station that is served

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board), effective January 1, 1996. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. The captioned proceedings were pending with the ICC prior to January 1, 1996, and concern functions which are now under this Board's jurisdiction. Accordingly, references in this decision are to the old law (West Ed. 1995) unless otherwise indicated.

by only one rail carrier over a bottleneck segment.[2] In each case, the bottleneck carrier now delivers coal to the generating station either in single-line service from the mine currently supplying the utility's coal, or in interline service with another rail carrier over an established through route. In No. 41242 (the CP&L case) and No. 41626 (the MidAmerican case), the utilities wish to ship coal from the Powder River Basin in Wyoming using different routings and rates than those presently available to them. In No. 41295 (the PP&L case), the utility desires to shift from Pennsylvania coal transported by the bottleneck carrier in single-line service to coal from West Virginia or Kentucky mines served only by other carriers, with delivery by the bottleneck carrier. PPL seeks rates for this multi-carrier transportation.

To counter what they perceive as the bottleneck carriers' present undue market power over their coal shipments, the utilities each seek to have their coal transported over shipper-designated routes under separately set component rate factors. The utilities, relying upon a rail carrier's obligations under 49 U.S.C. 10742 and 11101(a) to maintain reasonable interchanges with other rail carriers and accept all traffic reasonably tendered to them, seek to have each bottleneck carrier provide (and if necessary have the Board prescribe) a trainload or unit-train local rate for transportation over the bottleneck segment of the designated route from an interchange point of the shipper's choosing. Although origin-to-destination service requiring more than one rail carrier typically uses proportional or joint rates,[3] the utilities seek to have a non-bottleneck rail carrier transport the coal to the interchange point under a separate, unrelated rate. According to the utilities, breaking the transportation movement into separate components and obtaining a local rate over the bottleneck segment (set by prescription, if necessary) would enable them to secure (likely by contract pursuant to 49 U.S.C. 10713 (now 49 U.S.C. 10709)) competitive rate and service offerings for the non-bottleneck segment that they allegedly cannot receive now, and thereby work to satisfy the statutory directive "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. 10101(a)(1).

In each instance, the bottleneck carrier has refused the utility's request to establish a local unit-train or

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[2] A **bottleneck segment** is the portion of a rail movement for which no alternative rail route is available.

[3] A **local rate** is a rate for transportation originating and terminating on the carrier's line. A **joint rate** is a unitary (single-factor) rate set by mutual agreement between the participating carriers that is applied to a **through movement**, a movement that originates on one carrier's line and terminates on another's. A **proportional rate** is set by a single carrier for applicability only to its portion of a through movement. A proportional rate is different from a local rate because it is expressly conditioned to apply only to traffic having a prior or subsequent move on another carrier through a specified interchange point. A proportional rate is also different from a joint rate because it does not involve participation by any other carrier in setting or applying the rate.

trainload rate, and each utility has filed a rate complaint challenging the only rate available for local service over the bottleneck segment--a single-car local rate. Asserting that this rate is unreasonably high as applied to its traffic, the utility in each case has asked the Board to prescribe a maximum reasonable local rate for trainload or unit-train movements of coal between the particular interchange points and generating stations at issue.

The defendant railroads have moved to dismiss the rate complaint in each case. In two of the cases, the bottleneck carriers argue that, because they already provide single-line service (MidAmerican) or have designated an interchange for through-route service (CP&L) for the utilities' traffic from the Powder River Basin to the respective generating stations, they are not required to provide service over any other routes, particularly where they would be deprived of their long-haul service that is protected by 49 U.S.C. 10705(a)(2). The carriers further argue that the Board may intervene under 49 U.S.C. 10705(a)(1) to prescribe new routes only where complainants have satisfied the requirements of the competitive access rules at 49 CFR 1144.5, and that the utilities have failed to present any evidence under those rules to warrant such regulatory intervention. See Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd sub nom. Baltimore Gas & Electric Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987) (Baltimore Gas).[4]

The bottleneck carriers further argue that, even if they offered (or were ordered by the Board to provide) transportation over the utilities' desired routes, the pending rate complaints must still be dismissed for several reasons. First, they argue that the utilities cannot challenge a single-car local rate, because the utilities' traffic is not local and does not move in single-car shipments. Second, the carriers maintain that they have the prerogative under 49 U.S.C. 10701a (now 49 U.S.C. 10701(c)) to determine the type of rate to offer on through traffic and cannot be forced to establish a separately challengeable local unit-train or trainload rate for the bottleneck segment of the through movements involved here. Third, they assert that, if they choose to establish joint or proportional unit-train rates (as Conrail has in the PP&L case for projected coal shipments from West Virginia and Kentucky), the utilities cannot obtain a reasonableness determination and rate prescription confined to the bottleneck segment alone, but instead must challenge the reasonableness of the entire origin-to-destination movement. See Louisville & N.R.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 231-34 (1925) (L&N); Great Northern Ry. v. Sullivan, 294 U.S. 458, 462-63 (1935) (Great Northern); and Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 400-10 (1989) (Met Ed).[5] Permitting segmented

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[4] In PP&L, Conrail has moved to dismiss the complaint seeking prescription of a local rate, but not insofar as it challenges the rates that Conrail has set over the through routes that it has established with its connecting carriers. Unlike CP&L and MidAmerican, in PP&L, there is no dispute over the routes provided for service.

[5] The railroads state that, although they are not required to do so, they may establish local rates that they designate for use in through traffic, Thompson v. United States, 343 U.S. 549, (continued...)

reasonableness determinations on through movements would, according to the railroads, directly threaten the industry's ability to price differentially and recover its full costs, and thereby defeat Congress' directive to "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues." See 49 U.S.C. 10101a(3); Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Coal Rate Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

In opposing dismissal, the utilities respond that the competitive access rules are not implicated in MidAmerican and CP&L because complainants seek only local service, not the prescription of a through route. The utilities further argue that, even if through-route relief were required, relief should be available in these cases because the bottleneck carriers' refusal to establish local rates from the requested interchange points effectively forecloses competitive service over other routes and is, by itself, sufficient evidence of anticompetitive conduct to support a through-route prescription under the competitive access rules.

The essence of the utilities' position, however, is that they have the right to deal separately with each carrier that participates in the movement of their traffic and, as a result, that they have the right to a separately challengeable local rate in each of these cases. The utilities argue that the principles of L&N and Great Northern (requiring a reasonableness challenge to the entire through rate) do not extend to independent local rates, and should not be applied in any event when transportation over the non-bottleneck segments will be provided by rail contract not subject to our jurisdiction, 49 U.S.C. 10713(i)(1) (now 49 U.S.C. 10709(c)(1)), or when to do so would thwart Congress' more recent directives in 49 U.S.C. 10101a(1) to allow competition to establish reasonable rates.

While the facts in each case vary, the three cases pose common issues of industry-wide significance for rail carriers and shippers concerning the extent to which bottleneck carriers may exert their market power over the routes and rates made available to shippers for needed rail service. Accordingly, by decision served August 27, 1996, and supplemented on September 18, 1996, we requested comments from all interested or potentially affected persons on the broader legal issues and policy implications presented by these complaints.

Comments and rebuttal were filed with us on October 15 and October 25, 1996, respectively, and we held an oral argument on October 31, 1996.[6] Having considered the pleadings in the individual proceedings, and the recent comments, rebuttal, and

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556-59 (1952); if they do, however, the carriers argue that such rates are also immune from a separate reasonableness challenge under the rationale of L&N/Great Northern, notwithstanding contrary suggestions in Met Ed, 5 I.C.C.2d at 406-07. Comments of the Association of American Railroads (AAR), October 15, 1996, at 13-15 & n.12.

[6] We note that, while the railroad industry was united in its position, the shippers were not; several took positions at odds with those advanced by the utilities.

oral presentations, we will now act in the three "bottleneck" cases before us.[7] In the first section of our discussion, we address the principles that we conclude govern the cases at hand; in the second section, we review the law and policy and our approach to future requests for bottleneck-segment rate relief; and in the third section, we examine in more detail each of the three complaints before us here.

DISCUSSION

I. -- Governing Principles.

Central to the disposition of each case is whether the bottleneck carriers properly refused to establish a "local" unit-train or trainload rate over the bottleneck segment. As a threshold matter, railroads are required, under their common carrier obligation, to establish rates and routes to move a shipper's traffic from origin to destination, 49 U.S.C. 11101(a), and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. 10742. Thus, if a utility seeks coal from an origin that is not served by the destination bottleneck carrier, either directly or under an existing through route, the bottleneck carrier cannot refuse to provide interline service to the destination generating station. Instead, under its common carrier and interchange obligations, the bottleneck carrier must accept this traffic from a new origin at a reasonable interchange point and establish a rate over the bottleneck segment to complete the transportation.[8]

However, in providing service from a mine to a utility plant--either by itself or in interline service with another carrier--the bottleneck carrier is not required to establish a local rate for the bottleneck segment. Under 49 U.S.C. 10701a(a) (now 49 U.S.C. 10701(c)), a rail carrier "may establish any rate for transportation or other service" that it provides, and, pursuant to that initiative, may choose to establish local, joint, or proportional rates. See, e.g., United States v. Illinois C.R.R., 263 U.S. 515, 522 (1924); Met Ed, 5 I.C.C.2d at 409. The utilities' argument that they have a right to a local rate rests on the mistaken belief that, under the common carrier obligation, a carrier must hold out to provide **all** possible rates and services that a shipper may request. In fact, where a destination bottleneck carrier establishes proportional or joint rates for unit-train or trainload coal transportation to the generating station, it is not required to provide a local unit-train coal rate as well for transportation that is not local to the bottleneck carrier.[9]

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[7] We note that one of the issues that we raised involved the question of "abstractness." During the oral argument, both the shippers and the carriers indicated that they recognize that a shipper requesting a rate must provide sufficient information to enable the railroad to respond. Accordingly, we will not address this issue further.

[8] That is why the ICC, by order served January 17, 1995, ordered Conrail to file rates to be used for the interline shipments from the new origins from which PP&L sought coal.

[9] Reliance by coal shippers on cases such as Routing Restrictions Over Seatrain Lines, Inc., 296 I.C.C. 767 (1953) is (continued...)

The fact that a bottleneck carrier may have transported, for test-burn or other purposes, an isolated coal shipment pursuant to a single-car local class rate would not change that result, nor provide an indirect basis for obtaining prescription of a local unit-train rate for the utility's regular, high-volume through shipments. Where the bottleneck carrier has established joint or proportional rates for through transportation, it need not also hold out local service for that traffic, and we do not intend to entertain complaints designed artificially to produce that end.[10]

Further, in establishing through routes and rates to complete the transportation of the utility's coal to the generating station, the bottleneck carrier may, in the first instance, determine the interchange through which that service will be provided. The carrier is not required to open an additional route through a different interchange simply because the shipper asks it to do so, without regard to the criteria of 49 U.S.C. 10705(a). Through the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)[11] and Staggers Rail Act of 1980 (Staggers Act),[12] Congress ended the "open-routing" system that effectively had required rail carriers to establish and maintain interchanges and through routes "on practically all combinations of railroad tracks between two points." Baltimore Gas, 817 F.2d at 110. Instead, as an integral part of Congress' goal of revitalizing the rail industry, these statutes largely freed carriers to "rationalize their route structures making maximum use of efficient routings and eliminating others." Interchange Provisions at Jacksonville, FL, SCL and SRS, 365 I.C.C. 905, 916 (1982); see also, e.g., Baltimore Gas, 817 F.2d at 110-15; Western Railroads--Agreement, 364 I.C.C. 635, 649 (1981).

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misplaced. (See, e.g., Comments of Western Coal Traffic League (WCTL), October 15, 1996, at 12-14.) At most, as WCTL appears to concede on rebuttal (WCTL Rebuttal, October 25, 1996, at 12-13), Routing Restrictions indicates that, where a through route does not exist, a shipper could obtain and pay "separate local rates" to each rail carrier required for its transportation. 296 I.C.C. at 774-75. Routing Restrictions is not relevant, however, once a bottleneck carrier has created a through route by establishing joint or proportional rates for the underlying through service. Once a carrier offers rates sufficient to complete the through traffic, it need not offer, nor does a shipper have the right to insist upon, separate local service and rates as well. Moreover, even in situations where local rates have been established and are potentially available to construct a through rate and route, Routing Provisions holds that local rates cannot be used in that manner unless the carrier acquiesces. 296 I.C.C. at 774-75, 783-85.

[10] A challenge to a single-car rate would be essentially irrelevant to the unit-train service regularly involved in movements from coal mines to utility plants. Therefore, we do not intend to entertain challenges to single-car rates unless they are the rates actually moving the traffic or intended to move the traffic.

[11] Pub. L. No. 94-210, 90 Stat. 31 (1976).

[12] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

Giving the shippers the routing control that they seek here would defeat the statutory provisions protecting each railroad's right to determine, at the outset, which reasonable through routes it will use to respond to requests for service. 49 U.S.C. 10705(a)(1), (a)(2). These provisions, taken as a whole, provided the basis for the competitive access rules. Under those rules, a carrier does not have unlimited discretion as to how to provide service requested by a shipper. Shippers, however, may not unilaterally dictate the terms of service through artifices such as a request for a local rate for what is clearly a through movement. Rather, shippers dissatisfied with a railroad's response to a request for service must seek relief through the competitive access rules.

Thus, while the Board may prescribe additional through routes "when it considers it desirable in the public interest," 49 U.S.C. 10705(a)(1), under our competitive access rules we do so only where it "(i) is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive and (ii) otherwise satisfies the criteria of 49 U.S.C. 10705 and 11103, as appropriate." 49 CFR 1144.5(a)(1). As first interpreted in Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171, 181 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) (Midtec), to obtain access relief, including the prescription of through routes, shippers must show that a carrier "has used its market power to extract unreasonable terms on through movements, or, [] because of its monopoly position, has shown a disregard for the shipper's needs by rendering inadequate service."[13]

As a result, under the competitive access rules and the statutory criteria from which they are derived (see 49 U.S.C. 10705), carriers may generally protect their single-line or existing through routes by declining to establish other possible through routes, unless it can be shown that the alternative routes sought are more efficient, or that the carriers have exploited their market power by providing inadequate service over their existing through routes.[14] Because the utilities in each

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[13] In addition to the prescription of new through routes, two other access remedies are available: (1) reciprocal switching--service in which a bottleneck carrier, for a fee, transports the cars of the non-bottleneck carrier over its lines to destination, thereby permitting the non-bottleneck carrier to establish single-line rates for customers to which it does not have direct access; and (2) terminal trackage rights--full access, for a fee, permitting the non-bottleneck carrier actually to provide service over the lines of the bottleneck carrier and thereby complete its own single-line service. Although 49 CFR 1144.5(a) specifically addresses only through-route and reciprocal switching remedies, the same considerations would apply to requests for terminal trackage rights. Midtec, 3 I.C.C.2d at 178; 857 F.2d at 1494, 1501-02.

[14] The shippers' reliance on 49 U.S.C. 10747(a)(1) (previously section 10763(a)(1)) (e.g., WCTL Reply, October 25, 1996, at 16-17) is misplaced. That provision provides only that where a carrier has more than one established through route between two points:

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of the cases have premised their requested relief on the asserted obligation of a carrier to establish local rates, they have either not addressed the requirements of the competitive access rules or addressed them inadequately. Simply establishing that a carrier refused to open an additional through route at the shipper's desired interchange point is not, by itself, evidence of anticompetitive conduct sufficient under those rules to warrant the prescription of that route.[15] It has long been held that the statute and the competitive access rules neither direct nor were meant to require the government to create additional, competitive rail through routes simply upon demand. Baltimore Gas, 817 F.2d at 114-15.

The utilities argue that this well-established regulatory framework should give way in light of Congress' general directive in the Staggers Act "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. 10101a(1). We take seriously the procompetitive objectives of the statute. However, notwithstanding that general language, Congress chose not to provide for the open routing that shippers seek here. To the contrary, as discussed above, Congress retained and strengthened the specific statutory provisions allowing carriers to select their routes and to protect their long-hauls.

The utilities further rely on the general statutory directive, also added by the Staggers Act, "to minimize the need for Federal regulatory control over the rail transportation system," by intervening to provide regulatory relief only when required. 49 U.S.C. 10101a(2). They argue that the prescription of local rates and requirement for competitive routings would minimize the need for future regulatory relief. Nevertheless, what the utilities propose, in the name of regulatory forbearance, is full regulatory intervention; they seek through regulation to deprive carriers of their statutorily-recognized

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a shipper should be permitted to choose the route over which its traffic will be shipped. It does not require that a carrier maintain two routes in order to give a shipper that choice.

Changes in Routing Provisions-Conrail-July 1981, 365 I.C.C. 753, 772 (1982), vacated on other grounds, Chesapeake & O. Ry. v. United States, 704 F.2d 373 (7th Cir. 1983).

[15] See, e.g., Docket No. 41242, Reply of Central Power & Light Company to Motion to Dismiss of Southern Pacific Transportation Company, October 14, 1994, at 14-15. Shippers elsewhere argue that not providing local-rate service over alternative routes permits bottleneck carriers to improperly maximize profits on their existing routes through a "classic vertical [price] squeeze," anticompetitive conduct that should warrant access relief under the regulations. E.g., Comments of Western Resources, Inc., October 15, 1996, Testimony of George H. Borts at 4. The statute, however, already provides maximum rate regulation that would act to protect shippers against excessive rates. Thus, a shipper may not rely solely on the fact that a bottleneck carrier is maximizing its profits, to the extent that the existing regulatory framework permits, as the basis for competitive access relief.

long-haul and their traditional routing discretion. Thus, theirs is not a deregulatory initiative.

In summary, a shipper may not insist upon local rates for what is really a through service. If a shipper seeks a rate from an origin that is not currently served by the bottleneck carrier, either directly or in interline service, the carrier must accept the traffic at a reasonable interchange and establish a rate over the bottleneck segment to complete the transportation. A shipper seeking an alternative routing from an origin from which it is already served by the bottleneck carrier, either directly or in interline service, must proceed under the competitive access provisions of the statute. As set forth further in Part III, application of these principles requires us to dismiss, in whole or in part, each of the complaints before us.

II. -- General Application of the Governing Principles.

Having determined that a utility served by a bottleneck carrier may not force competition simply by seeking prescription of local rates over the bottleneck segment of its origin-to-destination movement, we explore here whether the kind of relief the shippers seek is otherwise available. In this section, we address competitive access and rate reasonableness issues germane to that consideration.

Competitive Access Relief

As explained above, a utility served by a bottleneck carrier may not obtain an additional routing by the indirect means of seeking prescription of local rates over the bottleneck segment of its origin-to-destination movement. Rather, if it wants a routing that the bottleneck carrier is unwilling to provide, it must seek relief through the competitive access rules.

The competitive access rules were promulgated not to provide shippers with an alternative form of rate relief [Midtec, 857 F.2d at 1505-07; Intramodal Rail Competition--Proportional Rates, Ex Parte No. 445 (Sub-No. 2), slip op. at 2-4 (ICC served May 2, 1990)], but to offer a competitive remedy where a bottleneck carrier has exploited its market power by providing inadequate service over its own lines or foreclosing more efficient service over another carrier's lines. In evaluating such matters, we are attentive to the "classical categories of competitive abuse" that could produce such a result, including foreclosure, refusal to deal, or "other recognizable forms of monopolization or predation." Midtec, 3 I.C.C.2d at 173-74. We must also factor in the operational and service criteria of section 10705, including the comparative efficiency of routings, Midtec, 857 F.2d at 1503, and in doing so "take into account **all** relevant factors." 49 CFR 1144.5(a)(1) (emphasis added).

Although the competitive access rules were the product of shipper/carrier negotiation, we perceive a sense among the shippers that, as construed in such cases as Baltimore Gas and Midtec, they stacked the deck against shippers ever obtaining "competitive access" relief. We disagree. Midtec and the other prior cases addressing competitive access all involved requests for reciprocal switching or terminal trackage rights, "access" remedies that are far more intrusive than the prescription of

through routes.[16] Moreover, they involved the application of the rules to their unique facts.

We cannot declare in advance just what must be shown to make a competitive access case justifying the prescription of a new through route. No shipper has brought such a case to date, and relief would, of course, depend on the peculiar circumstances of each particular case. One vehicle for making such a case, however, would appear to be a transportation contract entered into for service over a non-bottleneck segment. We can foresee situations where contracts contain service terms providing benefits, advantages, and projected efficiencies that would make the proposed service over the non-bottleneck segment "better" than that presently offered by the bottleneck carrier over the existing through route, and make the bottleneck carrier's "foreclosure" of that service over an additional through route conduct that would warrant prescriptive relief. Assuming the shipper presents sufficient facts in that regard, there is nothing in our competitive access regulations to preclude a competitive access remedy, and we are prepared to interpret the rules in a manner that will provide for relief in appropriate circumstances.[17]

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[16] See Vista Chem. Co. v. Atchison T. & S.F. Ry., 5 I.C.C.2d 331 (1989) (reciprocal switching); Shenango, Inc. v. Pittsburgh, C. & Y. Ry., 5 I.C.C.2d 995 (1989), aff'd sub nom. Shenango, Inc. v. ICC, 904 F.2d 696 (3d Cir. 1990) (terminal trackage rights). In rejecting the argument that Congress intended that we "prescribe reciprocal switching more freely than through routes," Midtec, 857 F.2d at 1500, the D.C. Circuit observed that:

> [i]f Congress intended any disparity in [the Board's] discretion to deny these remedies, . . . it would almost certainly have been by making reciprocal switching less rather than more available [than through routes].

Id. at 1501.

[17] Relying upon Pennsylvania R.R. Co. v. Public Utilities Comm. of Ohio, 298 U.S. 170 (1936) (Ohio), some of the utilities argue that a competitive access remedy is not required when a shipper obtains a contract for the non-bottleneck segment, because exempt contract service over one route-segment and common carrier service over another cannot be combined to form a through route. Transcript of Oral Argument, October 31, 1996 (Transcript) at 116-17. We disagree. In Ohio, the Court held only that the ICC did not have jurisdiction over an intrastate rail movement that was preceded by an interstate movement provided in private carriage not subject to the ICC's jurisdiction. Ohio, however, does not extend to movements preceded by unregulated or exempt movements provided by a carrier. Cf. Central Freight Lines v. ICC, 899 F.2d 413 (5th Cir. 1990). Here, unlike Ohio, all of the services are provided cooperatively by rail carriers that are subject to the Board's jurisdiction, and the utilities thus cannot use Ohio to create the fiction that common carrier rail service following a rail contract movement "originates" at the interchange point, rather than the mine.

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The previous access cases did not involve, and hence did not address, the role of contracts in the context of requests for the establishment of a through route. We note, however, that Congress in the Staggers Act broadly "encourag[ed]" shippers and carriers to transact their rail transportation service by contract. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 98-101 (1980). We also note that contracting provides a much better opportunity than common carriage for a rail carrier to address in detail a shipper's particular service needs, to provide service tailored to those requirements, and, as relevant here, to qualitatively distinguish such service from that offered elsewhere. Thus, although we do not suggest that shippers not entering into contracts will be shut out of the competitive access process, through the use of contracting, shippers seeking "through route access" may be able to establish underlying facts on comparative service inadequacies and/or efficiencies necessary to support such relief under the requirements of our rules.

The shippers' concerns over tying contracts to competitive access and other relief appears to be motivated, at least in part, by their perception that they will be unable to obtain contracts unless we force -- or at least strongly encourage through regulatory action -- the carriers to enter into contracts. In particular, at oral argument they asserted that the railroads' increasing concentration through recent mergers, and the defendant carriers' resistance to the requested relief in these complaint cases, is somehow evidence of a broader non-competitive "mindset" in the railroad industry. This mindset, they claim, would preclude shippers from obtaining competitive contract offers from non-bottleneck carriers unless the Board first prescribed local rates over the bottleneck segment. Transcript at 29-30.

There is no basis on which to conclude that recent merger applications filed by particular railroads are indicative of a non-competitive mindset in the industry.[18] To the contrary, recent decisions have found that competition has remained vigorous even where the number of competitors has been reduced

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Moreover, while a contract entered into under section 10709 insulates the service under that contract from regulatory oversight, section 10709 does not override the routing and long-haul protections afforded under section 10705 to the non-contracting, connecting rail carrier for service over its route segment; section 10709 was not intended to impose new regulatory obligations on non-contracting parties. Thus, the fact that a contract may exist on one route segment of its preferred route would not relieve the shipper from having to make a case under the competitive access rules to obtain service over the other.

[18] The argument that we should afford rate relief to mitigate the competitive harm caused by merger-related industry concentration is without merit. When we have approved mergers, we have done so because we found that the public benefits produced by the merger outweighed any associated competitive harm. Moreover, when we found potential competitive harm, we mitigated it through our conditioning power. In our view, recent merger activities have not produced, on an industrywide basis, competitive harm that needs to be mitigated through broad-based rate relief. Individual rate reasonableness challenges, of course, will continue to be available.

from three to two as a result of a merger.[19] The fact that the railroad industry, through its positions in these complaint proceedings, has indicated a desire to maximize industry-wide profits has no bearing on whether individual railroads will compete with each other when asked by individual shippers to do so. To the contrary, in these proceedings, at least some non-bottleneck carriers have indicated their readiness to enter into contracts for the non-bottleneck portion of their service that the shippers claim they seek. Transcript at 208-09.

In summary, when we address a shipper's request for a through route under the competitive access regulations -- involving contract or common carrier service -- we will consider a broad range of factors in examining what the rules characterize as "act[s]" that are "anticompetitive." For example, in our consideration, we will be mindful of the fact that contracting for rail transportation service was an important element in the scheme established by Congress in the Staggers Act for creating a more competitive, less regulated rail transportation system. The competitive access rules were designed to protect the railroads' freedom to rationalize their systems and maximize service over their most efficient routes, legitimate goals that both Congress and this Board clearly endorse. However, they were not designed to defeat legitimate competitive efforts by other rail carriers and shippers by permitting bottleneck carriers to foreclose more innovative, advantageous, and efficient service.[20]

Rate Reasonableness Review

Where through routes have been constructed by joint or proportional rates, shippers raising rate reasonableness issues under 49 U.S.C. 10701(a) have generally been required to challenge the entire rate over a through route, and have not been permitted to challenge a discrete segment. Underlying this requirement is the rationale that "[t]he shipper's only interest is that the charge shall be reasonable as a whole" (Great Northern, 294 U.S. at 463; see also L&N, 269 U.S. at 234; Met Ed, 5 I.C.C.2d at 400-10), and that, as a result, there is no basis for looking only at one component part of that charge.

The shippers concede that joint rates can only be reviewed as a whole, but they argue that existing precedent supports a separate reasonableness analysis for each of the components of a combination of proportional rates, regardless of whether service preceding or following that over the bottleneck

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[19] Many objected to the Board's imposition, as a condition to the Union Pacific/Southern Pacific merger, of UPSP's trackage rights agreement with the Burlington Northern/Santa Fe (BNSF), on the ground that "duopoly" in the West would invariably lead to "market splitting and collusion" between the two major carriers. Union Pacific Corp.--Control and Merger--Southern Pacific Transp. Co., Finance Docket No. 32760 (Decision No. 44), slip op. at 116-18 (STB served Aug. 12, 1996). However, the pleadings filed by both carriers involving reconsideration and clarification of our merger decision suggest that BNSF and UPSP intend to vigorously compete for traffic affected by the trackage rights agreement.

[20] We recognize that efforts by shippers to make a competitive access case using transportation contracts may raise issues of confidentiality and privilege, and we are prepared to craft procedures and orders necessary to address those concerns.

segment is by common or contract carriage. The railroads, for their part, assert that under no circumstances can the reasonableness of a proportional rate established for a bottleneck segment be reviewed separately.[21] Neither position is legally valid.

For common carriage through traffic, the shippers' position would, in effect, defeat the through nature of a proportional rate. As the Great Northern Court stated, for that traffic, a "proportional [rate] cannot be applied save as it is part of the through rate." 294 U.S. at 463. As such, combined proportional rates are "more akin to [unitary] joint rates," properly challengeable only in their entirety. Met Ed, 5 I.C.C.2d at 403 n.22. For such rates, "[t]he shipper's only interest is that the charge shall be reasonable as a whole." Great Northern, 294 U.S. at 463; see also L&N, 269 U.S. at 233.

The shippers argue that Great Northern, and a prior Supreme Court decision on which it relied,[22] established a distinction between prescription of future rates and reparations for past rates. For reparations, they argue, Great Northern required a shipper to challenge the entire through rate. For prescription cases, they argue, Great Northern and Santa Fe permitted shippers to segment proportional rates in regulatory proceedings.

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[21] In addition to their legal argument based on their interpretation of ICC and court precedent, the railroads assert that separate rate reasonableness regulation of bottleneck segments would be bad policy because it would undermine the carriers' ability to differentially price their services (that is, to charge higher markups on their captive traffic). The railroads argue that differential pricing is necessary so that they can earn sufficient revenues to recover all of their joint and common costs and support reinvestment in, and replacement of, needed network facilities. See Coal Rate Guidelines, 1 I.C.C.2d at 526-28. They are concerned that a policy of separately capping the rate for the bottleneck segment of the through route at the stand-alone cost (SAC) level would produce, for the remaining (non-bottleneck) segment of the through route, a much lower, competitive rate level that could not return its share of those costs. As a result, the facilities for that traffic, absent sufficient revenues for reinvestment, would gradually disappear. Based on this scenario, the industry estimates that, if shippers were broadly permitted to obtain separate bottleneck segment-rate prescriptions, rail carriers would lose in excess of $2.4 billion in annual net revenue. AAR Comments, Verified Statement of Craig F. Rockey and John C. Klick, Tab 7. The utilities, on the other hand, assert that the revenue losses projected by AAR are overstated.

Although we do not expect our decision here to produce the types of revenue disruptions projected by the railroads, our decision does not turn on whose projections are more accurate. Our decision is, in our view, mandated by the law. Moreover, the revenue impact of our decision will depend on numerous imponderables concerning the way in which carriers and shippers compete for business.

[22] Atchison, T. & S.F. Ry. v. United States, 279 U.S. 768, 776 (1929) (Santa Fe).

We disagree. Great Northern, which arose in the context of a reparations case, did not address the appropriate regulatory treatment of a prescription case. Moreover, Santa Fe did not hold that shippers could seek the prescription of a proportional rate alone. Rather, it involved a suit between **railroads** concerning a carrier's duty to establish a reasonable rate on its portion of a through route so as not to foreclose that route for another carrier. The case did not address a **shipper's** challenge to the reasonableness of the proportional rate, but only the reasonableness of the rate as it might prejudice the route for a connecting carrier. 279 U.S. at 772-75. As a result, the Court did not suggest in either Great Northern or Santa Fe that, for purposes of a shipper's request for a rate prescription, we may consider the reasonableness of a proportional rate alone, without regard to the reasonableness of the total charges.

Accordingly, for traffic moving under a combination of common carriage proportional rates, we conclude that Great Northern has continuing "vitality." Met Ed, 5 I.C.C.2d at 408. Thus, a shipper's challenge to the reasonableness of a proportional rate covering a bottleneck segment that is combined with a common carriage rate over the non-bottleneck segment must, in our view, address the reasonableness of the entire through rate as a whole.

By contrast, when one of the components of service over the through route is embodied in a transportation contract, we cannot assess the reasonableness of the through rate in its entirety. While we are mindful of the railroad industry's need to differentially price its services, its substantial capital requirements, and our own duty in assisting rail carriers to earn adequate revenues, 49 U.S.C. 10101a(3), we must comply with other provisions of our governing statute. Specifically, 49 U.S.C. 10709(c)(1) (formerly 49 U.S.C. 10713(i)(1)) provides:

> A contract that is authorized by this section, and transportation under such contract, shall not be subject to [regulation], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

Plainly, we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract. Regulation of the entire through rate -- even if the contract rate were simply treated as a given that cannot be changed -- would indirectly result in review of the contract rate, and Congress has declared the rates for that portion of the through-route service to be beyond our reasonableness jurisdiction. As a result, in a complaint against a bottleneck proportional rate that operates in combination with a contract rate, we conclude that, in light of section 10709(c)(1), we may consider **only** the reasonableness of the bottleneck rate.[23]

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[23] Our analysis here is not inconsistent with our conclusions regarding competitive access. In competitive access cases, a contract may be used by the shipper to demonstrate that a connecting carrier should be required to provide competitive service; but the contract itself would not, in any sense, be (continued...)

We are aware that the ICC concluded otherwise in Met Ed, a case involving contract service over one part of a through route, and that the Supreme Court in Great Northern required a reasonableness determination for the full through rate where part of the charge was a Canadian proportional rate outside of the ICC's jurisdiction. See, e.g., Comments of Consolidated Rail Corporation, October 15, 1996, at 24-26. Those cases are ultimately unavailing, however, given the clear statutory limitations on our authority over contract rates. We note that the Canadian rate involved in Great Northern was fundamentally different from a contract rate because it was a published tariff rate, not an amount contained in an undisclosed, confidential service contract. More significantly, Great Northern predated, and the ICC in Met Ed did not squarely address, the jurisdiction-ousting language of 49 U.S.C. 10709(c)(1). In the Staggers Act, Congress made contracts "a separate class of rail service" that, once entered into, were thereafter "exempt (with certain limitations not relevant here) from all regulation and all of the requirements of the Interstate Commerce Act." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 100 (1980). The language of section 10709(c)(1) reflects this clear intent and binds us here. Thus, where through-route service combines contract and proportional rates, a shipper may present a rate reasonableness challenge to the discrete bottleneck proportional rate, tested by the stand-alone cost for the bottleneck segment.[24]

III. -- The Cases at Issue.

CP&L Case

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[23](...continued)
subject to regulation. In a rate case, review of the through rate would indeed subject the contract to regulation.

[24] We recognize that, in Ford Motor Co. v. ICC, 714 F.2d 1157 (D.C. Cir. 1983), the court determined that a rate reasonableness determination of the entire through rate could proceed notwithstanding the fact that one of the joint rate partners had, through a contract, settled the litigation as to itself. That case, however, like Met Ed, involved a joint rate into which both carriers had entered, and to which both carriers generally remained parties even after consummation of the rebate contract. It did not involve a situation in which the contracting railroad, although intending to be a party to through transportation, has entered into a separate rate contract from the outset. For that reason, and because the court in Ford, like the ICC in Met Ed, did not address the jurisdictional language of section 10709(c), neither Ford nor Met Ed changes our analysis.

Further, because the statute precludes us from considering the contract rate, we may not employ the so-called "intermediate" rate reasonableness approach on which we sought comments, under which we would permit the shipper to make a maximum rate reasonableness showing by adding the price of purchasing contract service over the non-bottleneck segment to the cost of constructing a stand-alone railroad over the bottleneck segment. See decision served August 27, 1996, at 8-9. We note that, in any event, in their comments and at oral argument, both the railroads and the shippers opposed the use of the intermediate approach under any circumstances.

Docket No. 41242 concerns coal transportation to CP&L's power plant at Coleto Creek, TX, which is served by the Southern Pacific Transportation Company (SP). CP&L opened a new facility at Coleto Creek that would permit it to burn the lower sulfur-content coal from mines in Wyoming's Powder River Basin served by competing rail carriers, BN and Union Pacific (UP). To lower the delivered cost of its coal requirements at Coleto Creek, CP&L sought to obtain less expensive coal from those mines. CP&L asked SP for a trainload or unit-train coal rate for service between Coleto Creek and either the nearest interchange point with UP (at Victoria, TX) or with BN (at Fort Worth, TX), so that CP&L could separately contract with either UP or BN to provide long-haul service from the Powder River Basin. SP rejected the utility's request.

CP&L then challenged SP's single-car local class rate for traffic moving between Victoria and Coleto Creek,[25] so that it could ask the Board to prescribe a local unit-train or trainload rate over that bottleneck segment. Alternatively, CP&L asked the Board to prescribe a new through route with an interchange at Victoria and require SP to publish appropriate through rates for that route.[26]

SP moved to dismiss CP&L's complaint, arguing that CP&L cannot challenge the single-car local rate, and that it has not met the criteria of 49 U.S.C. 10705(a) for having a through route prescribed over Victoria. SP's "consistent position" is that it will provide through service for CP&L from the Powder River Basin to Coleto Creek over its more efficient route from Ft. Worth.[27] UP Reply Comments, October 25, 1996, at 8.

We will dismiss CP&L's complaint for the reasons provided in Part I. SP is not required to publish a local unit-train rate from Victoria to Coleto Creek (nor would it have been if CP&L had requested in its complaint a local rate from Ft. Worth to Coleto Creek), and we will not entertain its challenge to SP's single-car rate to produce that result. Further, CP&L did not submit evidence addressing comparative efficiencies and/or other factors needed to establish, under our competitive access regulations, its right to obtain from SP an alternative through route (and rates) for Powder River Basin coal traffic

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[25] CP&L had shipped one carload of coal under that rate in advance of filing its complaint.

[26] Even though only UP connects with SP at Victoria, the recently-approved merger of UP and SP would not, by itself, moot CP&L's complaint. Under the terms of our approval of the merger, BN would have the right to serve Victoria using the UP track. Union Pac. Corp. et al.--Control and Merger--Southern Pac. Rail Corp. et al., Finance Docket No. 32760 (Decision No. 44), slip op. at 63 (STB served Aug. 12, 1996).

[27] CP&L contracted with UP and SP jointly to transport 200,000 tons of Powder River Basin coal for "test-burn" purposes; that traffic moved in 17 trainloads to Coleto Creek via interchange at Ft. Worth during the fourth quarter 1995 and first quarter 1996. UP Reply Comments, October 25, 1996, Reply Verified Statement (RVS), Joseph T. Hutton at 3. The carrier states that it remains ready to establish through rates via Ft. Worth for additional CP&L coal traffic from the Powder River Basin.

over Victoria, in addition to the through route SP is prepared to provide via Ft. Worth for that traffic. We will not entertain the request for local rates for what is a through service.

PP&L Case

Docket No. 41295 concerns transportation to four PP&L generating stations served by Conrail. The coal burned at these plants currently comes from Pennsylvania mines also served by Conrail, and the carrier transports the coal to these facilities in single-line service under a transportation contract.

To meet the requirements of the Clean Air Act, PP&L desires to shift to low-sulfur coal from mines in West Virginia and Kentucky that are served by Norfolk Southern Corporation (NS) and CSX Transportation, Inc. (CSX). PP&L approached Conrail and asked it to establish local trainload or unit-train rates for coal shipments from the interchange point with CSX at Lurgan, PA, and from the interchange point with NS at Hagerstown, MD. Conrail denied that request.

PP&L then filed a complaint challenging as an unlawful and unreasonable practice Conrail's refusal to establish local volume rates from the interchange point, and also the reasonableness of Conrail's single-car local rates for service from Lurgan and Hagerstown to PP&L's four facilities.[28] Conrail answered that the single-car rates were not appropriate for PP&L's unit-train coal traffic and asked for an opportunity to establish appropriate unit-train rates. The ICC directed Conrail to do so, by decision served January 17, 1995.

In response to the ICC's order, Conrail established a joint rate with CSX for shipments through Lurgan, and a proportional rate for traffic interlined with NS at Hagerstown. PP&L argues that Conrail was required by the ICC's order to establish a local rate for the bottleneck segment, and has filed a motion to enforce compliance with that alleged requirement. In addition, PP&L has amended its complaint to challenge the reasonableness of the new joint and proportional rates and has joined NS and CSX as defendants. The amended complaint continues to challenge the local single-car rates as well, and it asks for local trainload or unit-train rates to be prescribed from the Lurgan and Hagerstown interchange points to the four power plants.

Because it has filed joint rates with CSX, and proportional rates which can be used with NS rates, to complete the transportation to PP&L's generating plants of the coal from its new mine origins, Conrail argues that it need not file local rates for this service as well, and it has moved to dismiss PP&L's challenge to its single-car rates. The carrier also maintains that PP&L is not entitled to a separate rate reasonableness review of Conrail's portion of the through rates applicable to this traffic.

Unlike the CP&L case, PP&L does not involve a request for service over routes that the carrier does not offer; the

[28] PP&L had sent various shipments of coal over those routes for test burns, but the parties dispute the nature of the rate that was charged for those shipments.

parties agree that the Conrail routes via Lurgan and Hagerstown are appropriate, and that competitive access issues are not implicated here. E.g., Transcript at 128-29. Nonetheless, for the reasons provided in Part I, we shall dismiss PP&L's complaint against Conrail's single-car rate. By establishing joint and proportional rates for the involved service, Conrail has satisfied its common carrier obligation to complete PP&L's requested transportation from the new mine origins. As a result, Conrail is not required to publish a local unit-train or trainload rate for this through service, and we will not entertain PP&L's challenge to Conrail's local single-car rate as a way for it to obtain that relief.[29]

PP&L's amended complaint may proceed against the reasonableness of Conrail's proportional and joint rates for the through service, and we shall shortly issue a procedural order in that regard. For the reasons provided in Part II, PP&L may not obtain a rate analysis confined to the bottleneck segment of the respective transportation, but must address the reasonableness of the entire common carriage through rates as a whole.

MidAmerican Case

Docket No. 41626 concerns transportation to MidAmerican's power plant at Sergeant Bluff, IA, which is served only by the UP. MidAmerican's traffic currently originates at a mine in the Powder River Basin served by both UP and BN (see UP Comments, October 15, 1996, at 16), but moves to the generating station in single-line service under a transportation contract with UP that will expire at the end of 1997.

When that contract ends, MidAmerican would like the opportunity to obtain competitive rail service from BN, which, like UP, provides service from several mines in the Powder River Basin from which the utility is likely to satisfy its future coal needs. MidAmerican Comments, October 15, 1996, at 11-12; Transcript at 149. Favoring its present single-line service from those mine origins, however, UP rejected MidAmerican's request to establish a local unit-train rate over UP's bottleneck segment from Council Bluffs, IA, to its plant at Sergeant Bluff, which the utility could use in combination with separate service that it wished to obtain from BN from its selected mine origin to interchange.

MidAmerican then filed a complaint challenging UP's single-car local rate from Council Bluffs to Sergeant Bluff, so that it could ask the Board to prescribe a local unit-train rate over the bottleneck segment. UP moved to dismiss the complaint, on the grounds that it does not provide local service for Powder River Basin coal over its Council Bluffs-Sergeant Bluff line, and that it does not maintain, and cannot be required to maintain, a multi-carrier through route for unit-train movements between Powder River Basin mine origins and the Sergeant Bluffs generating station that it can serve single-line.

We will dismiss MidAmerican's complaint for the reasons provided in Part I. UP is not required to publish a local unit-train rate from Council Bluffs to Sergeant Bluff, and we will not

[29] For the same reasons, we likewise deny PP&L's motion to require Conrail to establish local unit-train rates.

entertain its challenge to UP's single-car rate designed to produce that result. We would have to dismiss MidAmerican's complaint on ripeness grounds in any event. As noted, the utility's coal currently moves under a transportation contract that does not expire until December 31, 1997. Under Burlington N. R.R. v. Surface Transp. Bd., 75 F.3d 685, 692-96 (D.C. Cir. 1996), the Board is without authority to adjudicate a rate case involving a common carrier rate that might be used upon the expiration of a contract until at or near the time at which the contract expires.[30]

MISCELLANEOUS

On November 27, 1996, the National Industrial Transportation League and WCTL filed a motion for leave to file a verified statement of Dr. Alfred E. Kahn. On December 16, 1996, AAR opposed the motion, arguing that Dr. Kahn's statement is really a time-barred reply. AAR requests that, should the Board elect to accept Dr. Kahn's statement, it also accept AAR's attached reply statement of Professors Baumol and Willig. To ensure as complete a record as possible, we will accept both statements into the record.

It is ordered:

1. The motions to dismiss the complaints in Nos. 41242 and 41626 are granted, and the proceedings are discontinued.

2. The motion to dismiss the amended complaint in No. 41295 is granted only as to the reasonableness of Conrail's local single-car rates, and whether it was an unreasonable practice for Conrail to refuse to establish local rates. In all other respects, the amended complaint may proceed, and the Secretary will publish separately a procedural schedule in that proceeding.

3. The motion for leave to file the verified statement of Dr. Alfred E. Kahn is granted; AAR's reply statement is also accepted for filing.

4. This decision will be effective on January 30, 1997.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Commissioner Owen commented with a separate expression.

Vernon A. Williams
Secretary

Commissioner Owen, *commenting*: It is unfortunate that

[30] At the oral argument, representatives of both railroads and shippers indicated their intent to address, through private sector discussions, the precise time at which a shipper should be permitted to file a complaint seeking a rate prescription for service currently subject to contract. We expect the parties to follow through on their representations.

parties to this proceeding are unwilling to reach negotiated settlements on these issues.

More unfortunate is that such reliance on government to solve private-sector problems encourages a cycle of dependence that weakens further the parties' negotiating resolve and encourages a return to third-party intervention that, as history records, was equally detrimental to both railroads and their customers.

Indeed, without a negotiated settlement among the parties this issue likely is headed for the lap of Congress where solutions too often are hastily drawn, politically motivated and for a long-time afterward insulated from change even by private agreement of the parties who had the dispute.

Whatever the eventual outcome, the fact remains that the parties have knocked loudly upon our door, ignored subsequent admonitions to settle these matters privately among themselves and continued to beg for government intervention.

Neither party should -- or, I suspect, will -- consider this decision a victory. With regard to open access, it certainly should **not** be viewed as a precedent that may be followed in other proceedings coming before this Board. For while I concur that shippers have failed -- in this proceeding -- to make a case for forceful elimination of bottlenecks, I am not at all convinced that it is in the long-term interest of shippers, railroads or this nation that bottlenecks and the anticompetitive behavior they can encourage be perpetuated.

With regard to this proceeding, I remind shippers of those days before the 4-R Act when it was possible for every shipper to second guess seasoned railroad officials in determining the routing for every carload of freight. Literally thousands of routes were available between most origins and destinations. In the extreme, a carload of freight could be routed from Dallas to Detroit by way of Los Angeles, requiring the inefficient participation of multiple railroads, unnecessary labor and the waste of productive capacity.

Although those seeking relief in this proceeding certainly are not yearning for a return to such inefficiencies, our acquiescence would place all shippers, all commodities and all railroads on a very slippery slope in that direction.

No wonder the community of shippers is far from united on this issue. In fact, many shippers have expressed strong and reasoned arguments why this Board should not grant the special-interest relief sought.

This is not a dispute between small businesses and large railroads, but one between equally large and powerful corporations. What we are being asked to do is to transfer wealth by force from one great corporate entity to another without a showing that the *status quo* is causing electricity rates to be higher than they otherwise would be and without a showing that there are inherent inefficiencies in the *status quo*.

To the extent railroads do exploit their market power and provide inadequate service or foreclose more efficient service over a competitor's track, then the door is open and I shall be

sympathetic. Shippers have yet to make efficiency arguments. What I hear is a demand for government to be a battering ram in order that shippers achieve even lower prices.

I must add that I might have supported a somewhat different outcome -- and might well be supportive of open access -- if it were determined that railroads no longer are to receive "special" assistance to achieve revenue adequacy. Congress, of course, has instructed this Board to assist railroads in achieving revenue adequacy.

Although I doubt that railroads remain revenue inadequate -- one need only read railroad annual reports or consult the research summaries of Standard & Poor's to raise such a doubt -- this Board's unchallenged decisions assert that most railroads remain revenue inadequate. And so long as that is so, the forceful opening of bottlenecks will drive all rail rates toward marginal costs with the result of adversely impacting all-important service levels and encouraging a flight of capital from the railroad industry.

I am compelled to comment also upon the notion of some shippers that mergers are creating a market concentration that will impede their ability to obtain competitive contracts with railroads.

In response I emphasize that "more" is not necessarily "better". As the Interstate Commerce Commission remarked in its 14th annual report in 1911, "no competition is so destructive as that between railways." Since 1920 it has been the public policy, as enunciated by Congress, to reduce the number of competing railroad systems. The reason is straightforward: To concentrate dwindling freight and passenger business on fewer tracks, permit elimination of redundant routes, signals, yards and terminals, reduce track maintenance, improve equipment utilization, and centralize management of marketing, sales, pricing, advertising and accounting.

The economic benefits of fewer railroads, coupled with deregulation, have been enormous and largely shared with railroad customers. Indeed, shippers do not challenge the existence or sharing of the savings, but complain that they want an even bigger share.

The plain-dealing fact is that there is a market cost to competition -- the cost of finding competitive alternatives. I am given to understand, for example, that only 55 percent of this nation's electricity is generated by coal, and only about 57 percent of that coal is carried by rail.[1] Additionally, electric utilities have gained new ability to "wheel" wholesale power.

I continue to believe that more efficient solutions to all shipper-carrier disputes are to be achieved in the marketplace

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[1] Of the 3 trillion kilowatt hours of electricity generated in 1994, 55 percent was provided by coal, 20 percent by nuclear power, 11 percent by natural gas, 9 percent by hydropower and 2 percent by "other" means. "Choices in a Competitive Economy," Center for Energy and Economic Development, April 1995; and "Destination of U.S. Coal by Origin, Destination and Method of Transportation," U.S. Department of Energy, 1996.

and through direct negotiations without the intrusion of government. Perhaps my admonition in favor of negotiation should include this paraphrase from Isaiah 1:18-20: "Come let us reason together, or ye shall be devoured by the sword." Since the day I joined this Board I have been preaching to railroads, shippers and unions that we must strive even harder to reduce our dependence upon government. I do so again.